86-804 (1)

NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1986

IN RE:
ROWAN COMPANIES, INC.,

Petitioner

AND
ROWAN COMPANIES, INC.

Petitioner

VERSUS

LOUIS W. STOREY

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF LOUISIANA, TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND PETITION FOR STATUTORY AND COMMON LAW WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID A. HURLBURT
HURLBURT, PRIVAT & MONROSE
POST OFFICE DRAWER 4407
Lafayette, LA 70502
Telephone: 318/237-0261
ATTORNEY FOR ROWAN COMPANIES, INC.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

52 pp

QUESTIONS PRESENTED

1.

Whether a defendant/employer has a statutory right to a jury trial in a Jones Act (46 USCA § 688) suit by an employee/seaman, when the seaman has elected to bring an action at law, such that the seaman cannot unilaterally amend his original complaint to strike the jury.

2.

If a defendant/employer has no statutory right to a jury trial in a suit at law under the Jones Act (46 USCA § 688), does such employer have a right to one under the Seventh Amendment to the United States Constitution such that the seaman cannot unilaterally amend his original complaint to strike the jury.

3.

If the Jones Act (46 USCA § 688) grants only seaman the right to trial by jury, is that statute an unconstitutional denial of the due process and equal protection rights of the employer under the Fifth Amendment.

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ROWAN COMPANIES, INC., by and through undersigned counsel, respectfully petitions this Court to issue (1) a writ of mandamus to the United States District Court for the Western District of Louisiana, Alexandria Division, and, to the extent necessary, to the United States Court of Appeals for the Fifth Circuit, ordering the amending complaint of LOUIS W. STOREY, stricken as impermissible under the Federal Rules of Civil Procedure, and the Constitution of the United States, and further affirmatively ordering that a jury trial take place; and/or (2) issue a statutory and/or common law writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. Since the petition in part questions

the constitutionality of an Act of Congress, 28 USCA § 2403(a) may be applicable. No United States court has previously certified the fact or existence of such question to the Attorney General.

The opinions below, the statutes involved, the questions presented, and the statement of the case with respect to this petition will be set forth herein. The same considerations that justify the assumption of jurisdiction by this Court under writ of certiorari, *a fortiori,* warrant the issuance of a writ of mandamus and/or common law writ of certiorari since the relief sought herein is essentially the same.

WHY RELIEF NOT AVAILABLE ELSEWHERE

The issues presented by these alternative petitions involve serious questions as to the denial of constitutional rights as a result of statutory interpretation. ROWAN COMPANIES, INC. (hereinafter ROWAN or petitioner), in the District Court, demanded a jury trial in a Jones Act case (46 USCA § 688, hereinafter Jones Act) brought "at law". (Note: The demand was in the form of a motion to strike the amended complaint of the seaman which sought (1) to withdraw his jury demand and (2) to simultaneously make a Rule 9(h) designation. F.R.C.P. Rule 9(h). Such reliance is legally recognized as permissible. *See, Calnetics Corp. vs. Volkswagen of America,* 532 F.2d. 674 (9th Cir. 1976), *cert. denied,* 429 US 90, 97 S.Ct. 355 (1976); and *Thomas vs. Peninsular and Oriental Steam Navigation Company,* 246 F.Supp. 592 (ED PA 1965)). The District Court denied ROWAN'S demand. Rowan sought the same relief in the Fifth Circuit Court of Appeals by way of writ of mandamus. However, ROWAN'S position directly

conflicts with Fifth Circuit jurisprudence as well as that of the specific District Court involved. Both Courts have held that absent allegations of diversity of citizenship, only a seaman has a right to a jury in a suit filed at law under the Jones Act, and, therefore, the seaman could freely amend to withdraw his demand. See *Rachal vs. Ingram Corporation,* 600 F.Supp. 406 (WD LA 1986), *affirmed,* at 795 F.2d 1210 (5th Cir., 1986). With ROWAN staring down the barrel of such precedent, it is clear that adequate relief cannot be had in any other form or forum. Fifth Circuit panels must follow other panel decisions unless and until reversed by the Circuit Court *en banc,* or by the United States Supreme Court. *Placid Oil Company vs. Federal Energy Regulatory Commission,* 666 F.2d 976 (5th Cir., 1982), *rehearing denied,* 673 F.2d 1322; *Cargill, Inc. vs. Offshore Logistics, Inc.,* 615 F.2d 212 (5th Cir., 1980); and *Robinson vs. Parsons,* 560 F.2d 720 (5th Cir., 1977). Furthermore, the District Court was obligated to follow the Fifth Circuit's lead. *Sturgeon vs. Strachan Shipping Company,* 698 F.2d 798 (5th Cir., 1983), *on remand,* 721 F.2d 144.

Mandamus is being sought pursuant to this Honorable Court's repeated statements that the right to a trial by jury is so important that any denial thereof is properly reviewable by such a writ. *Dairy Queen, Inc. vs. Wood,* 369 US 469, 82 S.Ct. 894, 8 LE 2nd 44 (1962); *See,* also *Ex parte Republic of Peru,* 318 US 528, 63 S.Ct. 793, 87 LE 1014 (1943) (mandamus is appropriate from the District Court to the Supreme Court where the case is of exceptional public importance). ROWAN has exhausted all efforts at relief on distinguishing grounds. There remains available to it only this forum in which the grave and significant issues can be presented.

OPINIONS BELOW

There was no formal opinion of the District Court as a result of any hearing nor argument. However, copies of its involved orders are reproduced in Appendice A and B. That Court denied petitioner's motion to strike on August 22, 1986, finding ROWAN had no jury trial right. A writ of mandamus was sought from the United States Court of Appeals for the Fifth Circuit. Their opinion has not as yet been reported, but is reproduced herein in Appendix C. On September 17, 1986. It too denied a jury trial to ROWAN.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USCA § 1651 (the All Writs statute), and under writs of certiorari pursuant to 28 USCA § 1254. (*See,* Rules of the Supreme Court Rule 17).

Jurisdiction in the District Court existed by virtue of a federal question under 28 USCA § 1331, and admiralty and maritime jurisdiction, 28 USCA § 1333. As noted above, the District Court denied relief to ROWAN by decision dated August 22, 1986. The Fifth Circuit's denial was by decision of September 17, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1.

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall***be deprived of life, liberty, or property, without due process of law***."

2.

The Seventh Amendment to the United States Constitution provides in pertinent part:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved***."

3.

Title 46 USCA § 688, commonly referred to as the Jones Act, provides, in pertinent part:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common—law right or remedy in cases of personal injury to railway employees shall apply:***."

4.

Rule 9(h) of the Federal Rules of Civil Procedure recites in pertinent part:

> "A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement indentifying the claim as an admiralty or maritime claim for the purposes of Rules...38(e)....If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15...:"

5.

Rule 15 of the Federal Rules of Civil Procedure states in pertinent part:

> "(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served....Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party: and leave shall be freely given when justice so requires."

6.

Federal Rule of Civil Procedure 38 recites in pertinent part:

> "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> ...
>
> (d) Waiver....A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

7.

Rule 39 of the Federal Rules of Civil Procedure states, in pertinent part:

> "(a) By Jury. When trial by jury has been demanded...the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) parties or their attorneys of record, by written stipulation

> filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.
>
> ..."

STATEMENT OF THE CASE

Litigation was initiated by the plaintiff, LOUIS W. STOREY (hereinafter STOREY) by filing suit in the United States District Court for the Western District of Louisiana, Alexandria Division, on October 15, 1985. (See Appendix D). STOREY invoked admiralty and maritime jurisdiction, as well as federal question jurisdiction at law under the Jones Act (46 USCA § 688). STOREY made no designation under Rule 9(h) of the Federal Rules of Civil Procedure. To the contrary, he specifically demanded trial by jury—a demand inconsistent with such designation. ROWAN, relied upon plaintiff's initial jury demand, and did not make an independent request in its answer. (See Appendix E).

On July 24, 1986, STOREY filed an amended complaint, to delete his jury demand and to make a F.R.C.P. 9(h) designation. An Order allowed the amended complaint on July 25, 1986. (See Appendix A). ROWAN, without a prior opportunity to oppose the filing of the amended complaint, filed a motion to strike suggesting STOREY could not withdraw his demand without ROWAN'S consent. *See* F.R.C.P. 38. ROWAN claimed it was entitled to rely upon

the jury demand of plaintiff. Without a hearing or argument, the District Court summarily denied the motion to strike citing *Rachal vs. Ingram Corporation* 795 F.2d 1210 (5th Cir., 1986). (See Appendix B).

Based on the then existing record, ROWAN filed for a writ of mandamus with the Fifth Circuit. Cognizant of the Fifth Circuit's decision in *Rachal, supra,* 795 F.2d 1210 (5th Cir., 1986), and the Circuit rules requiring panels to adhere to previously issued opinions *Placid Oil Company, supra,* 666 F.2d 976 (5th Cir., 1982), *reh'g denied,* 673 F.2d 1322; and *Cargill, Inc., supra,* 615 F.2d 212 (5th Cir., 1980), ROWAN utilized a suggestion of diversity to assert a constitutional right to a jury trial under 28 USCA § 1332. (The Fifth Circuit has recognized this previously in *Johnson vs. Penrod Drilling Company,* 469 F.2d 897 (5th Cir., 1972), *on reh'g en banc,* 510 F.2d 234 (5th Cir., 1975), *cert. den., Starnes vs. Penrod Drilling Co.,* 423 US 839, 96 S.Ct. 68 (1975), *overruled on other grds.* in *Culver vs. Slater Boat Co.,* 688 F.2d 280 (5th Cir., 1982). *But see, Emerson G.M. Diesel, Inc. vs. Alaskan Enterprise,* 732 F.2d 1468 (9th Cir., 1984); and *McCrary vs. Seatrain Lines, Inc.,* 469 F.2d 666 (9th Cir., 1972)). The Fifth Circuit, finding diversity was not apparent on the face of the complaint (and therefore, *Johnson vs. Penrod Drilling Company, supra,* did not apply), denied the writ on the strength of *Rachal.* As a result, this suit will proceed to Judge, and not jury trial, unless the relief prayed for herein is granted.

REASONS FOR GRANTING RELIEF

A. *OVERVIEW*

This case presents extremely important questions

concerning the interplay between constitutional rights under the Fifth and Seventh Amendments, the Jones Act (46 USCA § 688), diversity and federal question jurisdiction (28 USCA § 1332, and 28 USCA § 1331, respectively), and the Federal Rules of Civil Procedure. In effect, the Fifth Circuit holds that only Jones Act plaintiffs are entitled to a jury trial when suit is filed at law and where diversity has not been alleged as a jurisdictional base. *Rachal, supra,* 795 F.2d 1210 (5th Cir., 1986), and *Johnson vs. Penrod Drilling Company, supra.* Therefore, the logic continues, an employer cannot be heard to complain when the District Court allows the seaman to amend his prior complaint to withdraw his jury request making a F.R.C.P. 9(h) designation. *Rachal vs. Ingram Corporation, supra.* After all, the presence or absence of a Rule 9(h) designation is not *necessarily* binding. F.R.C.P. 9(h).

Yet, the liberality with which the amendment of pleadings is generally viewed (F.R.C.P. Rule 15) is tempered, for as the rule itself states, "...Leave shall be freely given *when justice so requires*"(emphasis supplied). The only justification for the *Rachal,* supra, conclusion is a finding that there is no statutory nor constitutional right to trial by jury afforded the defendant and therefore the procedural protections of F.R.C.P. 38 and 39 do not come into play. Obviously, Rules 38 and 39 exist to assure protection of Seventh Amendment rights. Since no stipulation or consent was obtained in the present case, only under F.R.C.P. 39 (a)(2) can the denial of a jury trial be justified. Absent a conclusion that the seaman has the exclusive jury trial right, the theoretical underpinnings of *Rachal,* supra, disappear. Because this proposition lies at the heart of the dispute and has implications far beyond statutory interpretation, it is significant to examine its origin and development.

First, ROWAN contends the Fifth Circuit is wrong in its interpretation of the Jones Act. ROWAN does have a jury trial right and therefore the amended complaint could not be allowed.

Second, if the Fifth Circuit's interpretation is accurate, ROWAN suggests that it has an independent right to a jury trial under the Seventh Amendment such that the amending complaint should not have been allowed.

Third, and finally, should this Court find that the Fifth Circuit's interpretation of the Jones Act (46 USCA § 688) proves accurate, *and* that there is no independent right to a jury trial afforded ROWAN under the Seventh Amendment of the Constitution, ROWAN suggests that its Fifth Amendment rights of due process and equal protection have been violated by the election provision of the Jones Act.

B. *STATUTORY INTERPRETATION*

The conclusion that only the seaman has a right to a jury trial in an action "at law" under the Jones Act springs from the mutilation of the principle that the seaman, and the seaman alone, has the right to elect between an action "in admiralty", on the one hand, and one "at law" on the other. *See* 46 USCA § 688. It is not the purpose of this petition to call into question the seaman's ability to make *that* election. Rather, ROWAN contends that once such election is made the same rules should apply to seaman and employer alike. The Fifth Circuit does not, apparently, believe in such equality. *Rachal,* supra holds that since the seaman has this initial election, *if* he decides to file "at law", he has a further *exclusive* election between a jury or

non-jury trial. ROWAN contends there simply is no support for this latter proposition.

Initially it is noted that the statute itself belies any such conclusion. Grammatically, the "at his election" language precedes and thus modifies the maintenance of "an action for damages at law". If the Congress wanted to give the seaman the sole right to elect jury or non-jury trial, the statute could very easily have been made to read:

> "Any seaman who shall suffer personal injury in the course of his employment may maintain an action for damages at law, with the right of trial by jury at his election...."

Tracing *Rachal's* challenged conclusion also produces interesting results. *Rachal* states the proposition matter-of-factly as,

> "In this case, however, when the initial complaint was filed and the plaintiff chose a civil action, the only right to a jury trial belonged to the plaintiff under the Jones Act." 795 F.2d at 1217.

Since such a cursory examination was made of the arguments on appeal, looking at the District Court decision is enlightening. In *Rachal,* supra, at 600 F.Supp. 406 (WD LA 1984), the District Judge elaborated on the support for his proposition:

> "However, under the Jones Act, a plaintiff seaman may elect to have a jury trial. 46 USCA § 688. This election belongs to the seaman, not his employer, and the employer may not require a

jury trial. *Johnson vs. Venezuelan Line SS Company,* 314 F.Supp. 1403, 1406 (ED LA 1970); *Texas Menhaden Company, vs. Palermo,* 329 F.2d 579 (5th Cir., 1964);" 600 F.Supp. at 407.

Admittedly, a brief perusal of the jurisprudence seems to support the proposition stated. The decisions cited and alluded to in this regard are *Fisher vs. Danos,* 671 F.2d, 904 (5th Cir., 1982), *cert. den. Gulf Oil Corp. vs. Fisher,* 103 S.Ct. 89, 459 US 840; *Doucet vs. Wheless Drilling Company,* 467 F.2d 336 (5th Cir., 1972), *cert. denied,* 410 US 956; *Texas Menhaden Company vs. Palmermo,* 329 F.2d 579 (5th Cir., 1964); *McCarthy vs. American Eastern Corp.,* 175 F.2d 724 (3rd Cir., 1949); *Vassalos vs. Hellenic Lines Limited,* 482 F.Supp. 906 (ED PA 1979); and *Johnson vs. Venezuelan Line SS Company,* 314 F.Supp. 1403 (ED LA 1970). However, on closer scrutiny, it is clear that the terminology utilized in these decisions was meant to describe the seaman's exclusive right to elect between a cause of action "in admiralty" and one "at law". Taking the language in these decisions out of context seems to have collectively contributed to the Fifth Circuit's erroneous equating of the choice of forum ("at law" or "in admiralty") with a choice between Judge or jury.

For example, in *Johnson vs. Venezuelan Lines Steamship Company, supra,* the Court stated the defendant could not elect between "admiralty" and "law", and, therefore, could not require a jury trial. This is partially correct. If the seaman elects to file "in admiralty", the employer cannot force any other election. However, the case does not address whether the employer has a right to a jury *if* the seaman files on the civil side. Additionally, *McCarthy vs. American Eastern Corp.,* 175 F.2d 724 (3rd

Cir., 1949), gives more ready support to the position as asserted by ROWAN. It is therein stated:

> "In our view the election to which the Jones Act refers is an election of remedies as between a suit in admiralty and a civil action. Prior to the passage of the Jones Act, unless there was a diversity of citizenship, a seaman was compelled in the Federal Court to assert his cause of action for injuries in a suit in admiralty in which there was no Jury trial. It was the purpose of the election clause of the Jones Act, we think, to make certain that an injured seaman, instead of suing in admiralty, could at his option assert his cause of action for personal injuries in the Federal Courts in an action at law regardless of diversity of citizenship, thereby *obtaining the right* to a jury trial..." 175 F.2d at 726-7. (emphasis supplied)

It is significant to note that in most if not all of the decisions cited above, there is no specific attention directed to the Judge or jury election. Rather the basic issue was the right of election as to civil or admiralty. The Fifth Circuit has drawn the conclusion that the only reason a seaman would want to bring a "civil" action would be to avail himself of the jury trial right. Therefore, since the plaintiff has the choice of admiralty or "civil" action, he has the sole choice on the jury decision. In so concluding the Court ignores the possibility that a civil action may be desirable without a jury. By filing on the civil side, the plaintiff obtains "the right to a jury trial...", *McCarthy, supra,* 175 F.2d at 726-7, and not the obligation to have a jury trial.

Clearly, the reference in the Jones Act to "with the

right of trial by jury" is nothing more than legislative clarification that the cause of action statutorily created is one "at law" with the full panoply of rights and obligations to apply. The legal proposition set forth in *Rachal* with such a cavalier air, simply cannot withstand logical analysis. Moreover, the Fifth Circuit's analysis subjects the statute to a due process and equal protection attack. (*See* Section C of this petition beginning at page 18).

This Court should reset the Fifth Circuit's compass. Without theoretical, logical, nor legislative support, a Jones Act employer should not be deprived of a right which "occupies so firm a place in our history and jurisprudence that any seeming curtailment...should be scrutinized with the utmost care." *Dimick vs. Schiedt,* 293 US 474, 486, 55 S.Ct. 296, 301, 79 LE 603 (1935).

C. *INFRINGEMENT ON THE SEVENTH AMENDMENT*

Alternatively assuming that the statute is being properly interpreted by the Fifth Circuit, and that, therefore, it grants only unto plaintiff the choice between Judge and jury, the question becomes whether or not there exists an independent basis for finding the employer entitled to a jury under the Seventh Amendment. As even the Fifth Circuit recognizes, the right to a jury trial does not emanate from the basis for jurisdiction alone, but rather derives from the Seventh Amendment itself. *Rachal,* supra, 795 F.2d 1210, 1216, Ftnt. 8 (5th Cir., 1986). A determination of whether a jury trial exists is a two-fold inquiry. First, what is the basis for jurisdiction? Second, assuming jurisdiction exists, does the claim at issue fall within the traditional framework of jury trial propriety? *Curtis vs. Loether,* 415 US 189. 94 S.Ct. 1005 (1974).

It goes without saying that there is no right to a jury trial solely at admiralty. Yet, if an independent jurisdictional basis exists consideration then becomes necessary with regard to the nature of the cause of action. See *Powell vs. Offshore Navigation, Inc.* 644 F.2d 1063 (5th Cir., 1981), *cert. denied.* 454 US 972, 102 S.Ct. 521 (1981); and *Willis vs. Woodson Construction Company,* 593 F.Supp. 464 (WD LA 1983). This is the conclusion the Fifth Circuit itself has reached at least with respect to diversity of citizenship. *Johnson vs. Penrod Drilling Company,* supra. In *Johnson* the Court held the employer does have a jury trial right under the Seventh Amendment, when there exists, in addition to admiralty, an independent basis of jurisdiction through which that constitutional entitlement flows. The Fifth Circuit's decision in this case reflects that the *Johnson vs. Penrod* scenario only seemingly fits if diversity is alleged on the face of the complaint. (See Appendix C, Page 2). On closer analysis it is quite apparent that the Fifth Circuit, in concentrating on the most prevalent basis for alternative jurisdiction - diversity, has overlooked a completely separate basis for jurisdiction - federal question. 28 USCA S. 1331.

Of seminal importance to this analysis are this Court's decision in *Fitzgerald vs. United States Line Company,* 374 US 16, 83 S.Ct. 1646 (1963); *Romero vs International Terminal Operating Company,* 358 US 354, 79 S.Ct. 468 (1959); and *Panama R.R. vs. Johnson.* 264 US 375, 44 S.Ct. 394, 68 LE 748 (1924). These decisions piggyback a conclusion that the civil action the seaman may elect under the Jones Act has a federal question jurisdictional base. 28 USCA § 1331. This is significant. Just because the basis of jurisdiction is federal question, as opposed to diversity, does not mean that a jury trial is not available absent a

specific statutory grant if all other requirements for jury trial are met. *See Curtis vs. Loether,* 415 US 189, 94 S.Ct. 1005 (1974); *Setser vs. Novak Inv. Company,* 638 F.2d 1137 (8th Cir., 1981), *cert. denied,* 454 US 1064, 102 S.Ct. 615; *In Re Incident Aboard D/B Ocean King,* 758 F.2d 1063 (5th Cir., 1985); *Brown vs. Mine Safety Appliances Company,* 753 F.2d 393 (5th Cir., 1985); *Powell vs. Offshore Navigation, Inc.,* supra; and *Moore vs. Sun Oil Company of Pennsylvania,* 636 F.2d 154 (6th Cir., 1980). In the instant case, when the plaintiff filed suit under the Jones Act and elected a trial by jury, federal question jurisdiction clearly attached. *Powell vs. Offshore Navigation, Inc.,* 644 F.2d 1063 (5th Cir., 1981), *cert. denied,* 454 US 972, 102 S.Ct. 521 (1981); *Willis vs. Woodson Construction Company,* supra; and *Johnson vs. Venezuelan Lines SS Company,* supra. The Court in *Powell* stated:

> "Since the Jones Act established a Federal statutory basis of recovery...jurisdiction of a Jones Act claim is founded on general Federal question jurisdiction, 28 USCA § 1331, and not on Federal admiralty jurisdiction...." 644 F.2d at 1067.

These conclusions are buttressed by the notes of the Advisory Committee to the 1966 Amendment to F.R.C.P. Rule 9. (See Appendix F).

Since there is nothing inherent in Federal question jurisdiction to be destructive of a jury trial (and in fact F.R.C.P. Rule 9(h) supports same), the second step makes it necessary to look to the nature of the relief sought. *See Curtis vs. Loether,* 415 US 189, 94 S.Ct. 1005 (1974). As stated in *Ross vs Bernhard,* 396 US 531, 90 S.Ct. 733 (1970), in analyzing *Curtis vs. Loether,* supra:

> "Some Courts took the view that no jury trial right attached to purely statutory causes of action which had no direct common-law counterpart. (Citations omitted). Whatever merit there may have been to this expansive notion, it was quickly deflated by *Curtis vs. Loether* (citations omitted).... *Curtis vs. Loether* shifts the focus to the second issue: the nature of the relief sought." 396 US at 538, Note 10, 90 S.Ct. at 738, Footnote 10.

Therefore, to determine whether or not a jury trial right exists an examination of the claim is necessary. Is it legal or equitable? Personal injury claims are inherently legal. *Ross,* supra, 396 US 531 at 538 (1970); *Myers vs. U.S. District Court, etc.,* 620 F.2d 741 (9th Cir., 1980). In *Setser vs. Novak Inv. Company,* 638 F.2d 1137 (8th Cir., 1981), *cert. denied,* 454 US 1064, 102 S.Ct. 615, the Court stated:

> "The Supreme Court has definitely held that '[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in ordinary courts of law.' *Curtis vs. Loether,* 415 US 189, 194, 94 S.Ct. 1005, 1008, 39 LE 2nd 260 (1974)."

In summary, the Jones Act affords federal question jurisdiction *(Fitzgerald vs. United States Line Company,* supra, and *Romero vs. International Terminal Operating Company,* supra) and that the nature of the relief sought herein meets the second criteria (*Curtis vs. Loether,* supra). Traditionally, suits for personal injury and monetary damages are the stuff of which "legal" as opposed to

"equitable" proceedings are made. See also *Ross vs. Bernhard,* supra; *Myers,* supra, 620 F.2d 742 (9th Cir., 1980). Finally, as noted by one of the country's most eminent scholars on the Federal judiciary,

> "The Jones Act remedy is 'legal' and there is a right of trial by jury." C. Wright, *Law of Federal Courts,* at Page 455 (1976).

It is submitted that ROWAN had a right to a jury trial when the plaintiff invoked federal question jurisdiction and made the demand himself. That demand could not thereafter be withdrawn without complying with the Federal Rules of Civil Procedure, F.R.C.P. 38, 39 and 15. These provisions require the consent of ROWAN to the withdrawal, or, at the very least, a finding by the Court that ROWAN was not entitled to a jury trial under any statute or the Constitution. Without meeting these requirements the plaintiff should not have been permitted to withdraw his jury trial demand. The amended complaint should be therefore stricken and the case reassigned to the jury docket.

C. *DENIAL OF DUE PROCESS AND EQUAL PROTECTION*

Alternatively, should this Court conclude that the Fifth Circuit's interpretation of the Jones Act is accurate and that the Seventh Amendment affords no independent jury trial right, ROWAN contends that the Jones Act violates the due process and equal protection to which ROWAN is entitled via the Fifth Amendment. The right to a trial by jury is a fundamental right since its foundation

lay in the Constitution itself. See *Buckley vs. Valeo,* 424 US 1, 96 S.Ct. 612, 46 LE 2nd 659 (1976); *Weinberger vs. Wiesenfeld,* 420 US 636, 95 S.Ct. 1225, 43 LE 2nd 514 (1975). Any right is fundamental that is explicitly stated or implicit in the constitutional grants. *Pradier vs. Elespuru,* 641 F.2d 808 (9th Cir., 1981); *National Organization for the Reform of Marijuana Law vs. Bell,* 488 F.Supp. 123 (DC 1980). With the right being accorded "fundamental" status, then any statute which seeks to discriminate in the grant of such a right must withstand strict scrutiny. *Shapiro vs. Thompson,* 394 US 618, 89 S.Ct. 1332, 27 LE 2nd 600 (1969).

Petitioner can fathom no basis whatsoever that would justifiably allow a seaman the sole and exclusive choice of mode of trial in a "legal" action. In so stating, ROWAN recognizes that seamen can elect between a civil and admiralty action. Still, once that election is made both plaintiff and defendant are bound by the same rules of procedure. If the seaman elects an action "in admiralty", neither he nor the defendant has the right to a trial by jury. However, the interpretation presently accorded the Jones Act allows the plaintiff not only to make an election between "at law" and "in admiralty", but when electing "at law" he has the sole right to select judge or jury (*see Rachal,* supra).

ROWAN is cognizant of the firmly embedded principle that seamen are typically treated as wards of the Court. *The Arizona vs. Anelich,* 298 US 110, 56 S.Ct. 707 (1936). However, there is nothing about such a protected status that can justify the discrimination noted. Procedurally, what justification can there be for affording the seaman the opportunity to manipulate the system according to his own

predilections? If so, then why not afford the seaman a "biased" jury? Why not deny the employer the right of cross-examination or the right to object? Why allow the employer to participate in jury selections?

There are obviously policy considerations to evaluate in connection with the remedies involved. However, there are principles of fundamental fairness at work. Once the framework has been laid, both parties are entitled to a fair trial. Both parties are entitled to have a disinterested trier of fact. To allow one party or the other the sole and exclusive choice under the circumstances presented would jeopardize the Constitutional principles of equality before the law and call into question the fairness principles upon which our system of justice is based. To allow such an exclusive choice immediately calls into question the existence of impartiality on the part of the trier of fact.

CONCLUSION

Given the significance of the issues presented herein, it is respectfully submitted that a writ of mandamus should issue requiring that the amended complaint of plaintiff be stricken, and the case replaced upon the jury docket. Alternatively, this Honorable Court is requested to issue writs of certiorari to the Fifth Circuit Court of Appeals. Neither statutory nor constitutional principles can be satisfied or preserved without the grant of relief as requested herein.

HURLBURT, PRIVAT & MONROSE
(A Professional Law Corporation)

BY: _____
DAVID A. HURLBURT
Post Office Drawer 4407
Lafayette, Louisiana 70502
Telephone: 318/237-0261
Attorney for ROWAN COMPANIES, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been served on all counsel by U. S. Mail on this 10th day of November, 1986.

DAVID A. HURLBURT

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

Filed July 25 1986

LOUIS W. STOREY	*	CIVIL ACTION
	*	
VERSUS	*	NUMBER: CV85-2977
	*	
ROWAN COMPANIES, INC.	*	SECTION: "A"

ORDER

PREMISES CONSIDERED, it is

ORDERED that the complainant, LOUIS W. STOREY, be allowed to file the First Amended Complaint.

THUS DONE AND SIGNED, this 25 day of July, 1986, Alexandria, LA.

/S/ F.A. Little, Jr.
UNITED STATES DISTRICT COURT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

Filed August 22 1986

LOUIS W. STOREY

VERSUS CIVIL ACTION NO:. 85-2977
SECTION "A"

ROWAN COMPANIES, INC.

ORDER

Considering the forgoing motion,

IT IS ORDERED that plaintiff's first amended complaint seeking to make a Rule 9(h) designation which in turn seeks to eliminate the jury trial, be and the same is hereby strickened.

_____, Louisiana, this _____ day of _____, 1986.

_____
UNITED STATES DISTRICT JUDGE

(Handwritten)
Denied - See Rachal v Ingram
5th Cir. opinion filed 4 Aug 86
Affirming this Court in a virtually identical matter.
Alexandria La.
22 Aug. 86

/s/ F.A. Little, Jr.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-4625

Filed Sep. 17, 1986

IN RE: ROWAN COMPANIES, INC.,
Petitioner.

ON PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA

Before CLARK, Chief Judge, GARWOOD and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

In *Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986), this Court held that the rule of *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (5th Cir., 1972), *on rehearing en banc*, 510 F.2d 234 (5th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975), respecting the defendant's right to insist on a jury trial under Fed.R.Civ.P. 39(a) in a Jones Act and unseaworthiness case, did not apply where federal jurisdiction was not also predicated on diversity of citizenship, but rather rested solely on the Jones Act and admiralty jurisdiction. The question in this case, then, is whether or not plaintiff's original complaint alleged diversity jurisdiction, in addition to jurisdiction under the Jones Act and

admiralty jurisdiction. We hold that diversity jurisdiction was not alleged, and that accordingly *Penrod* does not apply and under *Rachal* the defendant is not entitled to insist on a jury trial under Rule 39(a). We first observe that the caption of the complaint and its express jurisdictional allegations invoke only admiralty and maritime jurisdiction and the Jones Act; there is no express allegation that jurisdiction is based on diversity of citizenship, nor any reference to 28 U.S.C. § 1332. Further, the factual allegations respecting the parties are insufficient to invoke diversity jurisdiction. The original complaint alleges only that the plaintiff is "a resident . . . of the State of Mississippi." This is not a sufficient allegation for purposes of diversity jurisdiction, since "a statement that the party is a 'resident' of a particular state or foreign country is not sufficient since jurisdiction depends on citizenship and not mere residence." Wright & Miller, *Federal Practice and Procedure: Civil* § 1208 at p. 85. We have long followed that rule. *See Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984); *Neely v. Bankers Trust Co. of Texas*, 757 F.2d 621, 634 n. 18 (5th Cir. 1985); *Nadler v. American Motors Sales Corp.*, 764 F.2d 409, 413 (5th Cir. 1985). With respect to the defendant, the complaint alleges only that it is "a foreign corporation domiciled in Wilmington, Delaware authorized to do and doing business in the State of Louisiana." This allegation is also insufficient for diversity purposes because "a complaint properly asserting diversity jurisdiction must state both the state of incorporation *and* the principal place of business of each corporate party." *Illinois Central Gulf R. Co. v. Pargas, Inc.*, 706 F.2d 633, 637 (5th Cir. 1983) (emphasis in original);

Nadler, 764 F.2d at 413. The instant suit was filed in the United States District Court for the Western District of Louisiana, and the allegation that the defendant is "a foreign corporation" does not clearly allege that it is not a Mississippi corporation, but rather seems to allege that it is not a Louisiana corporation; if it were a Mississippi corporation, there would not be diversity, if we assume that plaintiff is a citizen of Mississippi. Further, we do not believe that the allegation that the defendant corporation is "domiciled" in Delaware suffices to allege that its state of incorporation *and* principal place of business are each Delaware (or that neither is Mississippi).

Thus, the original complaint was not a sufficient predicate for diversity jurisdiction. Accordingly, the rule of *Rachal* applies. Therefore, the district court did not err in refusing to strike plaintiff's first amended complaint on the ground that it sought to make an admiralty designation under Fed.R.Civ.P. 9(h) so as to eliminate a jury trial.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

Filed Oct. 15 1986

LOUIS W. STOREY	*	CIVIL ACTION
	*	
VERSUS	*	NUMBER: CV85-2977
	*	
ROWAN COMPANIES, INC.	*	SECTION:

COMPLAINT WITHIN THE ADMIRALTY AND MARITIME JURISDICTION PURSUANT TO THE PROVISIONS OF THE JONES ACT, 46 U.S.C.A. §688, AND THE GENERAL MARITIME LAW

TO THE HONORABLE UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF LOUISIANA:

The Complaint of LOUIS W. STOREY, a resident of the full age of majority of the State of Mississippi, County of Hancock, respectfully represents:

I.

That this case is cognizable under the Admiralty and Maritime jurisdiction pursuant to an Act of Congress, known as the Merchant Marine Act, commonly referred to as the Jones Act (46 U.S.C.A., §688) and pursuant to the

General Maritime Law of the United States of America, as hereinafter more fully appears.

II.

Made defendant herein is:

ROWAN COMPANIES, INC., a foreign corporation domiciled in Wilmington, Delaware, authorized to do and doing business in the State of Louisiana, and which has appointed C.T. Corporation System, 400 Poydras Street, New Orleans, Louisiana 70130, as its agent for service of process on causes of action arising in the State of Louisiana.

FOR A FIRST CAUSE OF ACTION

III.

On or about August 23, 1984, complainant, LOUIS W. STOREY, while in the course and scope of his employment with defendant, ROWAN COMPANIES, INC., as a seaman and member of the crew of the ROWAN HALIFAX, a vessel in navigation, upon information and belief owned by defendant, ROWAN COMPANIES, INC., was caused to be greviously, painfully and disablingly injured.

IV.

On information and belief, complainant alleges that the sole and proximate cause of the above-described

accident was the negligence of the defendant, ROWAN COMPANIES, INC., or its servants or agents, either individually or concurrently, in the following non-exclusive respects:

A) Breach of a legally imposed duty of reasonable care owed by the defendants to the complainant;

B) Failure to provide a reasonably safe place to work;

C) Creation and maintenance of an unseaworthy vessel;

D) Failure to promulgate and enforce safety regulations adequate to have prevented the accident; and

E) Other acts of negligence which will be proven at the trial of this cause.

V.

Prior to the above-described accident, complainant, Louis W. Storey, was an able-bodied seaman, 33 years of age.

VI.

That as a direct and proximate result of the aforesaid negligence of the defendant herein, complainant has suffered injuries and damages in the amount of ONE MILLION, TWO HUNDRED THOUSAND AND NO/100 ($1,200,000.00) DOLLARS.

FOR A SECOND CAUSE OF ACTION

Complainant repeats and re-alleges all of the foregoing paragraphs of his first Cause of Action with the same force and effect as if herein set forth at length, and in addition thereto, alleges:

VII.

Pursuant to the General Maritime Law of the United States of America, the defendant, ROWAN COMPANIES, INC., had the absolute and non-delegable duty to provide complaintant with a safe and seaworthy vessel and appurtenances, a seaworthy crew, and to provide complainant with a vessel reasonably fit for its intended purpose.

VIII.

That the defendant's vessel, was unseaworthy by reason of the aforesaid facts alleged in Paragraph IV. and that the injuries sustained by complainant were sustained as the direct and proximate result of the unseaworthiness of the vessel mentioned hereinabove.

IX.

As a direct and proximate result of the unseaworthiness of the vessel, ROWAN HALIFAX, complainant, LOUIS W. STOREY, suffered damages and injuries aforesaid, all to his damage in the full sum of ONE MILLION, TWO HUNDRED THOUSAND AND/100 ($1,200,000.00) DOLLARS.

FOR A THIRD CAUSE OF ACTION

Complainant repeats and re-alleges all of the foregoing paragraphs of his First and Second Cause of Action with the same force and effect as if herein set forth at length, and in addition thereto, alleges:

X.

Pursuant to the General Maritime Law of the United States of America, the defendant, ROWAN COMPANIES, INC., had the absolute and non-delegable duty to provide complainant with maintenance and cure benefits from the date that he was rendered unfit for duty until maximum cure is achieved.

XI.

As a result of the aforementioned accident, complainant was rendered unfit for duty and presently remains unfit for and incapable of returning to duty as a seaman.

XII.

The defendant, ROWAN COMPANIES, INC., is indebted unto complainant for past and future maintenance benefits in the amount of FORTY AND NO/100 ($40.00) DOLLARS per day from August 23, 1984, until maximum cure is achieved, and for the costs of all cure incurred by complainant from that date until maximum cure is achieved.

FOR A FOURTH CAUSE OF ACTION

Complainant repeats and re-alleges all of the foregoing paragraphs of his First, Second and Third Cause of Action with the same force and effect as if herein set forth at length, and in addition thereto alleges:

XIII.

Despite notice, defendant, ROWAN COMPANIES, INC., has refused to meet its maintenance and cure obligation in a willful, callous, unreasonable and arbitrary manner.

XIV.

Damages and Attorney's fees for SIX HUNDRED THOUSAND AND NO/100 ($600,000.00) DOLLARS would be an adequate amount to compensate complainant, LOUIS W. STOREY, for this willful, callous, unreasonable and arbitrary refusal to pay maintenance and cure benefits at the appropriate rate.

FOR A FIFTH CAUSE OF ACTION

Complainant repeats and re-alleges all of the foregoing paragraphs of his First, Second, Third and Fourth Cause of Action with the same force and effect as if herein set forth at length, and in addition thereto alleges:

XV.

Defendant, ROWAN COMPANIES, INC., through their employees, were recklessly and grossly negligent and

acted in wanton disregard for the safety of LOUIS W. STOREY in part, by conducting operations in an unsafe and hazardous manner.

XVI.

Defendant's, ROWAN COMPANIES, INC., gross negligence was a proximate cause of the injuries and damages suffered by complainant and entitles him to recover from defendant, punitive or exemplary damages.

XVII.

Damages in the true and full sum of SIX HUNDRED THOUSAND AND NO/100 ($600,000.00) DOLLARS would be an adequate amount to prove a disincentive to defendant to continue operations in such a reckless manner.

XVIII.

Complainant is an American seaman within the meaning and intent of 28 U.S.C. 1969 and is entitled to proceed and prosecute this litigation without prepayment of costs.

XIX.

Complainant is entitled to and therefore prays for a trial by jury on all issues raised herein.

WHEREFORE, complainant prays that after due proceedings and the expiration of legal delays:

I) There be judgment herein in favor of complainant, LOUIS W. STOREY, and against the defendant, ROWAN COMPANIES, INC., in the full and true some of ONE MILLION, TWO HUNDRED THOUSAND AND NO/100 ($1,200,000.00) DOLLARS, together with legal interest thereon from date of judicial demand, until paid, and for all costs of these proceedings;

II) There be judgment herein in favor of complainant, and against defendant, ROWAN COMPANIES, INC., for maintenance and cure benefits from August 23, 1984, until maximum cure is achieved with maintenance due at a rate of FORTY AND NO/100 ($40.00) DOLLARS per day;

III) There be judgment rendered in favor of complainant, LOUIS W. STOREY, and against defendant, ROWAN COMPANIES, INC., in the full and true sum of SIX HUNDRED THOUSAND AND NO/100 ($600,000.00) DOLLARS as punitive or exemplary damages, as well as for reasonable attorneys' fees, due to defendant's, ROWAN COMPANIES, INC., willful and callous failure to pay maintenance and cure at the appropriate rate;

IV) There be judgment rendered herein in favor of complainant, LOUIS W. STOREY, and against defendant, ROWAN COMPANIES, INC., in the full and true sum of SIX HUNDRED THOUSAND AND NO/100 ($600,000.00) DOLLARS as punitive or exemplary damages together with interest thereon from the date of the accident;

V) Complainant, LOUIS W. STOREY, be allowed to proceed in this matter without the prepayment of costs as a seaman; and

VI) For a trial by jury on all issues raised herein.

Respectfully Submitted,

NEBLETT, BEARD AND ARSENAULT
Attorneys at Law
Post Office Box 1190
Alexandria, Louisiana 71309-1190
Telephone: (318) 487-9874

BY: /s/ Richard J. Arsenault
RICHARD J. ARSENAULT

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

LOUIS W. STOREY

VERSUS CIVIL ACTION NO:. 85-2977

ROWAN COMPANIES, INC.

****

ANSWER ON BEHALF OF ROWAN COMPANIES, INC. TO COMPLAINT OF LOUIS W. STOREY

NOW INTO COURT, through undersigned counsel, comes ROWAN COMPANIES, INC., sought to be made defendant in the above entitled and numbered cause, who for answer to the complaint of LOUIS W. STOREY, respectfully represents that:

FIRST DEFENSE

The complaint fails to set forth facts which would support the jurisdiction of this Honorable Court and show that this Court is one of proper venue.

SECOND DEFENSE

The allegations contained in plaintiff's complaint fail to state a claim against this defendant upon which relief can be granted.

THIRD DEFENSE

Defendant denies all and singular the allegations contained in the plaintiff's complaint, except as the same may be hereinafter admitted and/or modified. Responding now to the specific paragraphed allegations of plaintiff's complaint, defendant responds as follows:

1.

For lack of sufficient information to justify a belief thereof, defendant denies the allegations contained in Paragraph I of the plaintiff's complaint.

2.

Defendant denies the allegations contained in Paragraph II of plaintiff's complaint, except insofar as to admit that ROWAN COMPANIES, INC., is a foreign corporation doing business in the State of Louisiana.

3.

For lack of sufficient information to justify a belief thereof, defendant denies the allegations contained in Paragraph III of the plaintiff's complaint.

4.

Defendant denies the allegations contained in Paragraph IV of the plaintiff's complaint.

5.

For lack of sufficient information to justify a belief thereof, defendant denies the allegations contained in Paragraph V of the plaintiff's complaint.

6.

Defendant denies the allegations contained in Paragraph VI of the plaintiff's complaint.

7.

Defendant responds to the allegations contained under the heading "For A Second Cause Of Action", and specifically the introductory paragraph thereof, to the same extent that it responded to the prior allegations, since the allegations of this introductory paragraph seek to do nothing more than repeat and reallege the foregoing paragraphs.

8.

Defendant denies the allegations contained in Paragraph VII of the plaintiff's complaint.

9.

Defendant denies the allegations contained in Paragraph VIII of the plaintiff's complaint.

10.

Defendant denies the allegations contained in Paragraph IX of the plaintiff's complaint.

11.

Defendant responds to the allegations contained under the heading "For A Third Cause of Action", and specifically the introductory paragraph thereof, to the same extent that it responded to the prior allegations,

since the allegations of this introductory paragraph seek to do nothing more than repeat and reallege the foregoing paragraphs.

12.

Defendant denies the allegations contained in Paragraph X of the plaintiff's complaint.

13.

Defendant denies the allegations contained in Paragraph XI of the plaintiff's complaint.

14.

Defendant denies the allegations contained in Paragraph XII of the plaintiff's complaint.

15.

Defendant responds to the allegations contained under the heading "For A Fourth Cause Of Action", and specifically the introductory paragraph thereof, to the same extent that it responded to the prior allegations, since the allegations of this introductory paragraph seek to do nothing more than repeat and reallege the foregoing paragraphs.

16.

Defendant denies the allegations contained in Paragraph XIII of the plaintiff's complaint.

17.

Defendant denies the allegations contained in Paragraph XIV of the plaintiff's complaint.

18.

Defendant responds to the allegations contained under the heading "For A Fifth Cause Of Action", and specifically the introductory paragraph thereof, to the same extent that it responded to the prior allegations, since the allegations of this introductory paragraph seek to do nothing more than repeat and reallege the foregoing paragraphs.

19.

Defendant denies the allegations contained in Paragraph XV of the plaintiff's complaint.

20.

Defendant denies the allegations contained in Paragraph XVI of the plaintiff's complaint.

21.

Defendant denies the allegations contained in Paragraph XVII of the plaintiff's complaint.

22.

Defendant denies the allegations in Paragraph XVIII of the plaintiff's complaint.

23.

Defendant denies the allegations in Paragraph XIX of the plaintiff's complaint.

FOURTH DEFENSE

Defendant avers further that the accident described in plaintiff's complaint, if any, was the sole result of the negligence of the plaintiff in particulars to be established on the trial of this case, which negligence is pleaded in bar of recovery herein.

FIFTH DEFENSE

Defendant avers further that all purported causes of action upon which plaintiff has complained, are prescribed under any and all applicable statute of limitations, and/or under any and all doctrines of laches, whichever may be applicable.

SIXTH DEFENSE

In the alternative, and solely in the event that liability is found on the part of this defendant, which is at all times specifically denied, then, in that event, defendant avers that the plaintiff was contributorily at fault which contributory fault is pleaded in bar and/or diminution of recovery herein.

WHEREFORE, premises considered, defendant prays that this answer be deemed good and sufficient, and that after due proceedings had, there be judgment herein in favor of the defendant, ROWAN COMPANIES, INC., and against the plaintiff, LOUIS W. STOREY, dismissing plaintiff's complaint with full prejudice and at his cost.

Defendant further prays for all general and equitable relief.

HURLBURT, PRIVAT & MONROSE
(A Professional Law Corporation)

BY: /s/ David A. Hurlburt

DAVID A. HURLBURT
Post Office Drawer 4407
Lafayette, Louisiana 70502
Telephone: 318/237-0261
Attorney for ROWAN COMPANIES, INC.

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has this day been mailed, postage prepaid and correctly addressed, to all counsel of record.

Lafayette, Louisiana, this 18th day of November 1985.

/s/ David A. Hurlburt

DAVID A. HURLBURT

APPENDIX F

NOTES OF ADVISORY COMMITTEE TO 1966 AMENDMENT TO F.R.C.P. RULE 9

"Many claims, however, are cognizable by the District Court whether asserted in admiralty or in civil action, assuming the existence of a non-maritime ground of jurisdiction. Thus at the present the pleader has the power to determine procedural consequences by the way in which the (sic) exercises the classic privilege given by the Saving-to-Suitors Clause (28 USCA S. 1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action *either party* may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute." (Emphasis supplied.)

No. 86-804

In the Supreme Court of the United States

OCTOBER TERM, 1986

IN RE:
ROWAN COMPANIES, INC.,

Petitioner

AND
ROWAN COMPANIES, INC.

Petitioner

VERSUS
LOUIS W. STOREY

Respondent

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF LOUISIANA, TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND PETITION FOR STATUTORY AND COMMON LAW WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD J. ARSENAULT
NEBLETT, BEARD & ARSENAULT
POST OFFICE BOX 1190
ALEXANDRIA, LOUISIANA 71309-1190
Telephone: (318) 487-9874
ATTORNEY FOR RESPONDENT, LOUIS W. STOREY

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-804

IN RE:
ROWAN COMPANIES, INC.,

Petitioner

AND
ROWAN COMPANIES, INC.,

Petitioner

VERSUS
LOUIS W. STOREY

Respondent

RESPONSE TO PETITION FOR WRITS OF MANDAMUS AND CERTIORARI

NOW INTO COURT, through his undersigned counsel, comes and appears respondent, LOUIS W. STOREY, who respectfully responds to the petition for writs of mandamus and certiorari filed in this Honorable Court by petitioner, ROWAN COMPANIES, INC., as follows, to-wit:

1.

The Honorable Supreme Court of the United States has previously provided that there is no right to a jury trial in a maritime case. There is no statutory nor Constitutional right to a jury trial in a maritime case, nor is there any jurisprudential precedent for such an erroneous contention. For the following reasons, petitioner is due neither a writ of mandamus nor a writ of certiorari.

REASONS FOR DENYING PETITIONER WRITS

A. *THE HISTORICAL DEVELOPMENT OF ADMIRALTY JURISDICTION CLEARLY SHOWS THAT THERE IS NO RIGHT TO A JURY TRIAL IN MARITIME CASES:*

Respondent has previously advanced the argument that, like a stork hovering above a sorority house, the decision in *Rachal v. Ingram Corp.*, 795 F.2d 1210 (C.A. 5th Cir. 1986) was the bearer of bad news for petitioner, ROWAN COMPANIES, INC. Likewise, before this Honorable Court, that stork brings additional bad constitutional and statutory news of every applicable sort to petitioner's desperate attempt to obtain a trial by jury.

As Judge Anderson stated in *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, at pp. 172-173 (C.A. 2d Cir. 1973:

> "...the time has still not come when one is entitled to a jury trial in every admiralty suit."

In fact, only recently has a party had any opportunity for a jury trial in a maritime case in federal court.

The absence of any right to a trial by jury in admiralty claims can be traced back to the very development and nature of American admiralty law. Our use of the term "admiralty" comes from the judicial powers granted to the Lord High Admiralty in England, to hear cases of a maritime nature, dating back to 1377. Gilmore & Black. ***The Law of Admiralty; 2nd Ed.*** The Foundation Press, Inc.; Mineola, N.Y. (1975) p. 9. This practice of the Admiral adjudicating alone and without a jury was carried over into the British colonies in America through the establishment of separate Vice-Admiralty courts. ***Gilmore & Black***, p. 10.

At the time of the adoption of the United States Constitution, therefore, the United States had a long tradition of Admiralty courts being separate from the courts of common law, as well as adjudicating without a jury. In addition to the absence of jury trials, admiralty practice was distinguished from common law personal injury actions by its terminology. For example, until the adoption of the Federal Rules of Civil Procedure in 1966, one initiated his common law action by filing a complaint, while the admiralty case was brought by means of a libel. Clearly, although combined into the same federal courts, admiralty jurisdiction and procedure was as separate and distinct from a common law action as was the federal courts' equity powers.

B. *THE JURY TRIAL RIGHT GUARANTEED BY THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS INAPPLICABLE TO ADMIRALTY CASES:*

The Seventh Amendment to the United States Constitution, relied upon by petitioner in arguing that it has a Constitutional right to a jury trial below, begins with the phrase: ***"In suits at common law..."***. The Redactors of the Seventh Amendment were well aware that an admiralty case was not a "suit at common law." id. The distinct nature of admiralty and maritime claims can be seen by their specific mention in United States Constitution, Article III.

Another distinction between admiralty and common law civil actions is found in Sec. 9 of the Judiciary Act of 1789, where Congress granted federal district courts original jurisdiction over admiralty and maritime claims. 1 Stat. 76-77. Furthermore, that same statute, in its "saving to suitors" clause, evidences the distinction between maritime and common law actions by providing: "saving to suitors, in all cases, ***the right of a common law remedy, where the***

common law is competent to give it;... id. For the next 175 years, the admiralty jurisdiction of the federal courts was kept separate from those courts' common law jurisdictions; "the admiralty docket was a thing apart, and the admiralty suit was handled under an entirely separate set of procedural rules." ***Gilmore & Black.*** p. 19.

In 1949, Congress enacted 28 USC 1333, which, along with its companion statutes, granted original maritime jurisdiction to federal district courts. 28 USC 1333 is, essentially, the reenactment of sec. 9 of the Judiciary Act of 1789. In 28 USC 1333, Congress recognized admiralty and maritime as a separate and distinct basis for federal jurisdiction. Previously, in 1937, this Court adopted Federal Rules of Civil Procedure Rule 2, which combined the equity and law powers of the federal courts, while the Notes of the Advisory Committee clearly distinguishes equity and law from admiralty.

In 1959, this Supreme Court, in *Romero v. International Terminal Operating Co.*, 79 S.Ct. 468, 358 U.S. 354, rejected contentions that the law side of the federal courts had jurisdiction over maritime claims, with the right to jury trials, under the provisions of 28 USC 1331. By so holding, this Supreme Court recognized the distinction between an admiralty case and a federal question ("*...civil actions arising under the Constitution, laws or treaties of the United States*"). 28 USC 1331. Once again the distinction between admiralty and common law actions was made.

By order of this Supreme Court, in 1966, much of admiralty procedure was combined with the Federal Rules of Civil Procedure. Nevertheless, portions of distinct admiralty procedures were preserved. Supplemental Admiralty Rules A through F were adopted, and admiralty distinctions were carried over into Rules 14, 26, 38, 73 and 82.

Lastly, the distinction between admiralty and federal common law is noted as currently being: ***"except in the admiralty field,*** *there is federal question jurisdiction of claims based upon federal law."* Wright. ***Law of Federal Courts; 4th Ed.*** West Publishing Co.; St. Paul, Minn. (1983) p. 97, citing *Illinois v. City of Milwaukee*, 92 S.Ct. 1385, 406 U.S. 91 (1972).

It is clear, therefore, that the Constitutional, statutory, jurisprudential and historical distinctions made between admiralty and common law actions show that the Seventh Amendment guaranty of jury trials in suits at common law is inapplicable to admiralty and maritime cases. Petitioner, then, has no Constitutional right to a jury trial herein. See: *Gilmore & Black. p. 295.*

C. *PETITIONER HAS NO STATUTORY RIGHT TO A JURY TRIAL HEREIN:*

In addition to having no Constitutional right to a jury trial in this maritime case, petitioner, ROWAN COMPANIES, INC., also has no statutory right to a jury trial.

Petitioner relies upon the provisions of Federal Rules of Civil Procedure Rule 38 for its statutory right to a Seventh Amendment right to a jury trial. Petitioner, however, overlooks a pertinent provision of F.R.C.P. Rule 38, which provides:

> These rules **shall not** be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Federal Rules of Civil Procedure Rule 9(h) is simply a procedural device whereby the pleader may claim the special

benefits of admiralty procedures and remedies, including a non-jury trial, when the pleadings show that both admiralty and some other jurisdiction exists.

Additionally, the "Jones Act", 46 USC 688, cited at p. Five (5) of the petition, gives the right to elect a jury trial to the injured seaman and not to his Jones Act-employer. This Supreme Court has so found the election to be with the seaman, in *Romero v. International Terminal Operating Co.*, supra.

It has been written that: "It was not the purpose of unification of the Rules to inject a right to a jury trial into those admiralty cases which do not provide for jury trial by statute." Norris. ***The Law of Maritime Personal Injuries. 3rd Ed.*** The Lawyers Co-Operative Publishing Co.; Rochester, N.Y. (1975) p. 418.

For these reasons, petitioner, ROWAN COMPANIES, INC., has no statutory right to a jury trial in the court below.

D. *THE SOLE LIMITATION TO THE WITHDRAWAL OF A RULE 9(h) IDENTIFYING STATEMENT ARE THOSE CONTAINED IN F.R.C.P. RULE 15:*

The pertinent provisions of F.R.C.P. Rule 9(h), cited at p. Five (5) of the petition, provides: "*The amendment of a pleading to* ***add or withdraw*** *an identifying statement is governed by the principles of Rule 15...*". F.R.C.P. Rule 15, reproduced in the petition at p. Six (6), allows amendment with leave of the court. Respondent, LOUIS W. STOREY, was granted leave to add a 9(h) identifying statement, so as to designate his claim as being maritime and to proceed to trial without a jury. It is this granting of leave to amend that so agrieves petitioner.

That a plaintiff can amend to identify a claim as being on the admiralty side of federal court, was correctly upheld in *Doucet v. Whelees Drilling Co.*, 467 F.2d 336 (C.A. 5th Cir. 1972), wherein that Court of Appeal wrote:

> **Plaintiff's choice of the law side was not an irrevocable one**...Under Rule 9(h) the amendment of a pleading to add or withdraw an identifying statement is governed by Rule 15, Federal Rules of Civil Procedure, the Rule governing amended and supplemental pleadings. The Advisory Committee's Note to that Rule says: **"The preferable solution [for providing some device for preserving the present power of the pleader to determine whether historically maritime procedures shall be applicable to his claim or not] is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which the procedural differences will remain, by a simple statement in his pleadings as to the effect that the claim is an admiralty or maritime claim."** id. at *339 et seq.*

It is perhaps due to the axiom that "a seaman is the ward of the federal courts" that such perogatives are given to the complainant. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 58 S.Ct. 651 (1938) (for the proposition that seamen are likened to wards of the court).

Other than by asserting that it has a right to a jury trial in the case *sub judice*, petitioner fails to show any prejudice it sustained by the trial judge's granting LOUIS W. STOREY leave to amend his complaint. No other attack is made upon

this discretionary act of the court below. Petitioner's argument, then, is that it simply does not want to "play by the rules", as they exist in the Federal Rules of Civil Procedure, and particularly under Rule 9(h).

E. *THE ORIGINAL COMPLAINT HEREIN SPECIFICALLY DOES NOT ALLEGE JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP:*

Since petitioner agrees that it has no right to a jury trial under the district court's admiralty jurisdiction (Petition p. 15), and since, although the Jones Act presents federal question jurisdiction, the plaintiff can elect to amend his complaint by adding a Rule 9(h) identifying statement and preclude jurisdiction on the law side of the court, petitioner must show some other basis for the trial court's jurisdiction if it is to receive a jury trial.

In *Rachal v. Ingram Corp.*, 795 F.2d 1210 (C.A. 5th Cir. 1986), the Court of Appeal, Fifth Circuit held that its rule in *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (C.A. 5th Cir. 1975), *on rehearing en banc* at 510 F.2d 234 (C.A. 5th Cir. 1975), and *cert. denied* at 423 U.S. 839 (1975), regarding the right to a jury trial under F.R.C.P. 39(a) in a Jones Act claim combined with an unseaworthiness claim, did not apply where the complaint failed to assert diversity of citizenship jurisdiction. As was fully noted within the opinion rendered herein by the Court of Appeal, Fifth Circuit (copied in Petition Appendix A-3 through A-5), nothing in the original complaint establishes diversity of citizenship.

It is axiomatic that a clear and concise statement of the court's jurisdiction must be included within the complaint. F.R.C.P. Rule 8(a)(1) and *Joy v. City of St. Louis*, 201 U.S. 332, 26 S.Ct. 478 (1906). Such a rule is particularly crucial

in maritime cases, where several grounds of jurisdiction might be present but where the plaintiff can elect for his case to be tried on the admiralty side of the court. As stated in Wright & Miller. ***Federal Practice and Procedure***, Vol. 5, sec. 1211, pp. 99-100:

> **If the nonmaritime ground for jurisdiction is being relied upon, the jurisdictional allegation should specify clearly the basis relied upon and plead it in the appropriate manner.** For example, diversity jurisdiction should be pleaded according to Form 2(a)...
>
> ---
>
> ...Thus, the requirements and consequences of Rule 9(h) should be considered carefully when both maritime and nonmaritime grounds for jurisdiction are available in the same suit.

F. *THE FEDERAL RULES OF CIVIL PROCEDURE DO NOT DENY PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAWS:*

For the reasons noted above, detailing why the petitioner DOES NOT have a constitutional right to a trial by jury herein, so also must its cry of denial of due process wither and die. Once again petitioner, ROWAN COMPANIES, INC., can be heard, at pp. 19-20 of its petition, to complain of the rights granted to injured seamen by this Honorable Supreme Court through its decisions and the Federal Rules of Civil Procedure. Put simply, petitioner should seek revision of the Rules and not seek the writs petitioned for herein. The courts below did nothing more than correctly apply F.R.C.P. Rules 9(h), 15, and 38. Yet petitioner does not allege the unconstitutionality of those Rules.

The most peculiar argument of all, however, is petitioner's assertion, at page 20 of its petition, that the impartiality of the entire federal bench is questioned merely because of the clear reading of the Federal Rules of Civil Procedure.

Petitioner's arguments that it has been denied due process and equal protection, therefore, lack any merit whatsoever. The deck is not so strongly stacked in the injured-seaman's favor simply because he has the right to elect between a judge versus a jury trial.

CONCLUSION

The notion of a jury trial in a maritime case is a creature of recent origin. Since admiralty has historically, constitutionally and statutorily been distinguished from the ordinary action at common law for the past several hundred years, the Seventh Amendment to the United States Constitution, expounding the right to a trial by jury in all "common law" suits, is inapplicable to admiralty actions.

Furthermore, there is also no statutory right for the admiralty defendant having a jury trial. General Maritime cases do not fall under the district court's federal question jurisdiction, and the Jones Act, which is a federal question, gives the plantiff the right to elect which procedures will control the course of the claim.

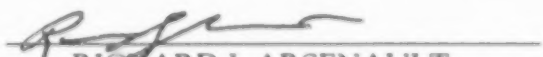
Lastly, a maritime complaint, which may contain several basis for jurisdiction, may contain a Rule 9(h) indentifying statement and thereby be brought on the admiralty side of the federal court without a jury trial. That statement is not etched in stone, and may be added or withdrawn whenever allowed by F.R.C.P. Rule 15. Since a Jones Act defendant has no right to trial by jury, that

defendant is not prejudiced by such a subsequent amendment to the seaman's complaint.

Petitioner, ROWAN COMPANIES, INC., concedes that it is "staring down the barrel" of Fifth Circuit precedent (Petition p. 3), and, therefore, this Honorable Court should "reset the Fifth Circuit's compass" (Petition p. 14). The fifth Circuit precedents complained of are constitutionally, statutorily and jurisprudentially sound. The only compass requiring resetting is Petitioner's; reset to a course consistent with the well established and firmly entrenched principles which have guided those Honorable Courts below.

In conclusion, it is respectfully submitted that the petition for writs of mandamus and certiorari herein be denied, and that the correct decisions below be allowed to stand.

NEBLETT, BEARD & ARSENAULT

BY: 
RICHARD J. ARSENAULT
Post Office Box 1190
Alexandria, Louisiana 71309-1190
Telephone: (318) 487-9874
Attorney for LOUIS W. STOREY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been served upon all counsel of record by U.S. Mail on this 12th day of December, 1986.


RICHARD J. ARSENAULT